IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII Rule 32(2) (b)

Description of Case.

Crl. Appeal No.207 of 2005

Date of decision :- 04/5/2006

A.F.R. (Approved for reporting)

~~Not approved for reporting~~

Date :- 04/5/2006 Initials of Judge

Note :- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

HIGH COURT OF UTTARANCHAL, AT NAINITAL

CRIMINAL APPEAL NO.207 OF 2005

Shamim Ahmed
S/o Sri Mansoor Ahmed
R/o village Sikrodha
P.S. Bhagwanpur
District Haridwar .....Appellant

Versus

State of Uttaranchal .....Respondent

Date :- 04th May, 2006

Mr. J.S. Virk learned counsel for the appellant
Mr. Rajeev Mohan learned AGA.

Hon'ble J.C.S. Rawat, J.

1. This is a criminal appeal against the judgment and order dated 29.10.2005 passed the Addl. Sessions Judge, Haridwar in S.T. No75/2004 State Vs. Shamim Ahmed, whereby the appellant was convicted and sentenced to undergo R.I. for a period of five years and to pay fine of Rs.4000/- under section 366A I.P.C. The appellant was also convicted and sentenced to undergo for a period of seven years' R.I. and to pay fine of Rs.5000/- under section 376 I.P.C. Both the sentences would run concurrently. In default of payment of fine imposed under section 366A IPC and 376 IPC, the appellant was directed to undergo for further five months and six months R.I. respectively.

2. Brief facts of the prosecution case are that on 22.2.2003 the complainant-Umar Daraj lodged a 'gumshudgi' report (Ex.ka.1) at the police station alleging therein that on 21.02.2003 his daughter (prosecutrix) aged about 13 years went to the house of her maternal uncle. Thereafter, she left the house of her maternal uncle on 21.2.2003 without informing her

maternal uncle. When the prosecutrix did not return to her house, Mohd. Yamin had written a 'gumshidgi' tehrir' on behalf of the complainant. The complainant, Mohd. Yamin and Istyak were searching the prosecutrix. Ultimately, they succeeded to trace out the appellant as well as the victim on 25.02.2003 at about 12pm at Ranipur turn. The appellant was apprehended by the complainant at the spot and the prosecutrix was taken into custody of her father. Both were taken to the police station where an FIR was lodged in this regard. The victim was sent for medical examination. Dr. Meenakshi Agrawal medically examined the prosecutrix. The victim was referred for X-ray in order to determine the age. On the basis of examination of the girl, the doctor has opined that the age of the girl was above 16 years and below 18 years.

3. The investigation was taken up as usual which culminated into the submission of the chargesheet. After submission of chargesheet the accused was committed to the Court of Sessions for trial and the trial court framed charges against the appellant. The appellant denied charge levelled against him and claimed the trial.

4. The prosecution in order to support its case produced the oral evidence of the father of the victim. Umar Daraj (PW1) is the father of the prosecutrix and he proved the 'gumshudgi report' and the FIR. Mohd. Yamin (PW2) was also searching the victim alongwith Umar Daraj. PW2 has also narrated the story as to how the victim and the appellant were apprehended at the spot. Dr. Meenakshi Agarwal (PW3) has conducted the medical of the victim and she proved the medical

report (Ex.ka.4) and supplementary medical report (Ex.ka.5). Dr. N. K. Khanduri (PW4) conducted the X-ray of the victim in order to determine her age. Dr. Khanduri (PW4) proved X-ray report (Ex.ka.6). The prosecution has also adduced the evidence of Furkan (PW5) in whose presence the clothes of the victim was taken in the custody of police. H.C.-Vinod Kumar (PW6) was a formal witness, who proved the FIR (Ex.ka.7) and G.D. (Ex.ka.8). The prosecution has also adduced the evidence of the prosecutrix as PW7, who narrated the entire story. She had stated in her evidence that she born on 05.07.1989 and she studied upto fifth standard. She further stated that the appellant used to teach her 'Kuran Shareef'. On 21.02.2003 the appellant came to the house of her maternal uncle where the victim was staying. The appellant enticed and took her on the assurance that they would go together to her village. Instead of going her village, the appellant took her Ranipur bus stand from where she was taken to Roorkee on a truck. Thereafter, they went to Saharanpur and Jaipur. It was further stated that the appellant took a room at Jaipur where the appellant committed rape upon her in the night. The prosecution has also adduced the evidence of Sumitra Devi (PW8), who was the Principal of a primary school where the victim was a student. PW8 has proved the R.C. of the victim (Ex.ka.10) in which 5.7.1989 had been shown the date of birth of the victim. Naresh Chandra (PW9) was the Investigating Officer of this case. He submitted the chargesheet against the appellant. PW9 has proved the site plan (Ex.ka.12 & 13) and the chargesheet (Ex.ka.14).

5. In the statement recorded u/s 313 Cr.P.C. the accused appellant denied the prosecution case and stated that he had been falsely implicated in this case. The appellant had further stated that he used to collect the money for the school and used to deposit the same in the school. Khalil and Sher Mohd. wanted to grab the said money with the help of Mahbur Rehman. It was further stated that Khalil had taken a loan of Rs.10,000.- from his, out of which, Khalil had returned a sum of Rs.1100/- only and he further assured to return the rest of the due amount of the Eid festival. Khalil was the cashier of the school. The appellant was instructed by him to collect the money for the development of the school. The appellant further stated that Umar Daraj, Khalil, Sher Mohd. and victim came to his hosue and stated that there is some urgent work at Ranipur. On this, they reached at Ranipur. It was further stated that since the complainant alongwith other persons wanted to grab the money, hence he was falsely implicated in the case. The appellant has also given the written statement before the trial court and he has alleged the same facts in his written statement. The appellant had further stated in his defence that he was present in the 'Madarsa' situated in village Sikrokda on 22.02.2003. It was further stated that he remained in the said village till 25.02.2003. The appellant has also produced the witnesses in his defence i.e. Mohd. Hanif (DW1) and Sajid Ahmad (DW2). Both the defence witnesses had supported the version of the appellant that he remained in the village till 25.02.2003. Both these witnesses were produced before the court in order the proved the plea of 'alibi'.

6. The learned trial court after appraisal of the evidence on record, the appellant was convicted and sentenced as mentioned above.

7. I have heard the learned counsel for the parties and perused the evidence on record.

8 It is pertinent to mention here that it is a well settled position of law if the evidence of the victim is found reliable it does not require any corroboration on the material points. It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. She stands on a higher pedestal than an injured witness. If the court comes to the conclusion that the evidence of the victim is cogent and credible it does not need any further corroboration by any other independence evidence.

9. Learned counsel for the appellant contended that the victim was a consenting party. It was pointed out that she had sufficient opportunity to make a hue and cry when she remained alone at Ranipur bus stand. She could have taken the assistance of the public present at the bus stop. It was further contended that the victim had sufficient opportunity to make her escape good, but she did not make any hue and cry in the bus and train. It was further contended that the appellant and victim remained in a room together in the night at Jaipur, but she never protested. It was further contended that there was no mark of injury on her person which leads to take an inference that she never opposed the appellant while committing the rape.

Learned AGA refuted the contention. Even the victim was a consenting party, the court will have to see whether the consent of a minor girl is sufficient to have an intercourse. Learned AGA further contended that the victim was a minor at the time of offence. If the consent of a minor is obtained for the illegal act, the consent of a minor would be immaterial. The trial court had held that the victim was a consenting party to the sexual intercourse. I am completely in agreement with the findings of the trial court. The victim was taken on the cycle from the village to Roorkee bus stand and she remained standing there alone for a considerable time, but she did not true to escape or to make a cry there. The police constable remains on duty at the bus station. She could have sought the help of the police. She was taken to Sharanpur from where she seated in the train to Jaipur. She had ample opportunity to seek the help of the people of the G.R.P. Train Guards. She remained in Jaipur mosque. She could have sought the assistance of mosque people to get herself scot-free. These facts lead me to take inference that she was a consenting party. However, the consent is immaterial if the victim was below 16 years of age at the time of incident. Now, I have to examine what was the age of the victim. Umar Daraj PW1 has specifically stated in the FIR as well as in the evidence recorded before the court that the age of victim was about 13 years at the time of occurrence. The cross examination of PW1 shows that he had also given the specific date of birth of the victim. PW1 has specifically stated that the date of birth of the victim was 05th July 1989. The evidence of PW1 is unrebutted. There was no suggestion that the age of the victim was more that 16 years at the time of

occurrence. The evidence of PW1 is unrebutted on the point of date of birth of the victim. The evidence of the victim (PW7) is also available on this point. The victim had also stated that her date of birth is 05th July, 1989. The evidence of PW7 is also unrebutted. There is no cross examination with regard to the age of the victim. Both the witnesses were examined at length, but nothing could be elicited with regard to the age of the victim. The evidence of both these witnesses are credible and cogent. Apart this, this prosecution had also produced the evidence of Sumitra Devi (PW8), who was the Principal of a primary school where the victim was a student. PW8 has proved the T.C. of the victim (Ex.ka.10) in which the date of birth had been as 5.7.1989. The said T.C. also supports the version of these two witnesses with regards to the age of the victim. Sumitra Devi PW8 had also brought the register of the school regarding admission of the victim which also supports the version of these two witnesses with regard to the age. Where there is a credible and cogent substantive evidence available on record with regard to the date of birth, then the medical evidence would be only an opinion evidence. The substantive evidence of father, mother and school leaving certificate would prevail on the medical evidence with regard to the age of girl. In absence of substantive evidence, the court has to rely the medical evidence. The doctor's estimate of age is not a sturdy substitute for proof as it is only his opinion. But such opinion of an expert cannot be sidelined in the realm where the Court gropes in the dark to find out what would possibly have been the age of a citizen for the purpose of affording him a constitutional protection. In the absence of all other acceptable materials, if such

opinion points to a reasonable possibility regarding the range of his age it has certainly to be considered. In the instant case, there is sufficient material to come to the conclusion that the age of the victim was below 16 years and in presence of acceptable material the opinion cannot be substituted as a substantive evidence. In view of the above, I am of view that the victim was below 16 years at the time of occurrence. If the victim was below 16 years of age, the consent of the victim becomes immaterial. Therefore, the appellant cannot get any benefit.

10. It was further contended that the appellant was never apprehended by the complainant and others. It was further contended that the appellant has been falsely implicated in this case. Learned AGA refuted the contention. Perusal of the record reveals that the defence had not put any suggestion that he was not apprehended as had been stated by the prosecution. The prosecution has adduced the evidence of PW1- father of the victim. He had stated that the appellant and the victim were apprehended at Ranipur bus stand. The prosecution had also adduced the evidence of Mohd. Yamin (PW2), who accompanied with PW1 at the time of arrest of the appellant. PW1 and PW2 have proved the factum of arrest of appellant at the spot. The appellant had taken a case in his statement recorded under section 313 that the complainant, victim and other persons came to his house on 25.02.2003 and asked him to accompany them. It is admitted to the appellant that he was with the victim when the arrest has been shown. Now, the appellant cannot say that he was not present at the spot alongwith the victim. The appellant had stated in his

statement as indicated above. At the same time, he has taken a plea of ‘alibi’ that he was present in the ‘Madarsa’ situated in village Sikrokda from 22.02.2003 till 25.02.2003. On the other hand, he stated that the complainant and other persons came to his house on 25.02.2003 and asked him to go with them at Jwalpur. There are two contradictory pleas taken by the defence. Though, the prosecution has to stand on his own legs, but it cannot be sidestepped that the defence has not come with the clear probable defence. The theory of defence propounded before the court is not sustained.

11. In view of the above discussion I am of the view that the prosecution has established the guilt beyond reasonable doubt against the appellant. I find that the learned trial court has rightly convicted and sentenced the appellant. Hence, the appeal is dismissed and the conviction and sentence against the appellant awarded by the trial court are confirmed.

12. Let the lower court record be sent back to the court concerned. Compliance report be submitted within four months.

(J.C.S. RAWAT, J.)

Dated 04.05.2006

LSR